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Supreme Court of the United States

OCTOBER TERM, 1949

No. 76

TRAVELERS HEALTH ASSOCIATION and R. E. PRATT, as Treasurer thereof, and in his personal capacity,

Appellants,

v.

COMMONWEALTH OF VIRGINIA, at the Relation of State Corporation Commission,

Appellee.

BRIEF FOR APPELLANTS

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Appellants,

v.

COMMONWEALTH OF VIRGINIA, at the Relation of State Corporation Commission,

Appellee.

Appeal from the Supreme Court of Appeals of the State of Virginia

OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia in this case is reported officially in Volume 188 of the Virginia Reports at page 492. The opinion is also reported in Volume 51 of the Southeastern Reporter, 2d Series, page 263.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

In conformity with paragraph 1 of Rule 12 of the Rules of the Court, Appellants have heretofore filed their State

ment As To Jurisdiction setting forth in detail the grounds on which the jurisdiction of the Court is invoked. In addition, Appellants filed a brief in reply to Appellee's Statement Opposing Jurisdiction And Motion To Dismiss Or Affirm. Thereafter, on June 13, 1949, this Honorable Court entered the following order:

> "In this case probable jurisdiction is noted and the case is transferred to the summary docket." (R. 51)*

In summary, the grounds on which the jurisdiction of this Court is invoked are as follows:

(1) The case meets the requirements of Section 1257(2) of the Judicial Code and Judiciary, approved January 25, 1948, effective September 1, 1948 (Title 28 U.S.C., Section 1257(2)) in that the validity of Section 6 of the Virginia Securities Law (an act of the General Assembly of Virginia, approved March 23, 1932; Acts of 1932, Chap. 236, p. 434; Section 3848(52) of Michie's 1942 Code of Virginia)** is drawn in question on the ground of its being repugnant to the Constitution of the United States, and the final judgment rendered in the Supreme Court of Appeals of Virginia, dated January 10, 1949, is in favor of the validity of the statute (R. 29).

(2) The issue of the constitutionality of Section 6 of the Virginia Securities Law (herein called the "Securities Law") raises two substantial federal questions decided by the court below contrary to the controlling decisions of this Court: (a) the validity of the action of a state in attempting to subject a non-resident individual and an undomesticated foreign corporation to its jurisdiction by

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* References to the pages of the printed Transcript of Record are made herein as follows: (R.).

** See Appendix of this brief p. 38 for full text of this act

constructive service of process when they were not present in and have not performed any act within the state other than the transmitting of communications to its residents through the United States mails from outside the state, and (b) the validity of the action of a state in attempting to control the activities of such an individual and corporation occurring outside the state.

Appellants respectfully refer the Court to their Statement As To Jurisdiction for a more complete statement of the grounds on which the jurisdiction of this Court is invoked and their reasons and authorities in support thereof.

STATEMENT OF THE CASE

The Appellants in this case are Travelers Health Association, a non-profit Nebraska corporation, and R. E. Pratt, the Treasurer of the Association, a resident of Nebraska. The Association's principal purpose is to afford its members health insurance benefits which it does under the control and supervision of the Insurance Department of the State of Nebraska. It conducts all of its business from its Omaha office by use of the United States mails and has never had any soliciting agents operating in Virginia. It has for a number of years been acquiring members from among residents of the State of Virginia solely through the use of the United States mail from Omaha.

The case is an appeal from the judgment of the Virginia Supreme Court of Appeals affirming a cease and desist order in the nature of a permanent injunction entered by the Virginia State Corporation Commission on January 5, 1948,* pursuant to Section 6 of the Securities Law, enjoin-

* In the reported opinion of the Virginia Supreme Court of Appeals this order was inadvertently referred to as having been entered on May 3, 1948.

ing and restraining the Appellants from offering, advertising, promoting or selling membership certificates or contracts of indemnity or insurance in Virginia until a permit or authorization so to do had been secured from the Commission as required by the Securities Law.* There was no charge or intimation that there was anything fraudulent or misleading about Appellants' activities, nor that the membership certificates were fraudulent or in any manner inferior or misleading, financially or otherwise, nor that the terms of the certificates failed to meet the requirements of either Virginia or Nebraska laws.

The proceeding was instituted by the Virginia Commission on May 5, 1947, based upon information received from the files of the Commission, by the issue of an order against

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* Section 2 of the Securities Law (Section 3848(47) of Michie's 1942 Code of Virginia) includes such membership certificates and contracts within the definition of the term "securities", and Section 5 of the Law (Section 3848(50) of Michie's Code) requires every person or corporation desiring to engage in the selling or offering for sale of "securities" in Virginia to obtain such a permit as is referred to in the Commission's order of January 5, 1948. Section 9 of the Law (Section 3848(55) of Michie's Code) provides that such a permit will be issued only upon compliance with certain conditions specified therein. Section 15 of the Law (Section 3848(61) of Michie's Code) provides that any person violating the Law or attempting to evade its provisions shall be guilty of a misdemeanor and punished by fine or confinement in jail or both where not otherwise provided, and Section 17 of the Law (Section 3848(63) of Michie's Code) authorizes the Commission to impose a fine not exceeding $500.00 for failure or refusal to comply with any lawful order issued under the Law.

Section 6 of the Securities Law (Section 3848(52) of Michie's Code) (see Appendix of this brief p. 38 for full text) includes within the scope of the Law the promotion, advertising and sale of securities to Virginia residents by interstate mail, and authorizes the Virginia Corporation Commission, on its own motion or upon complaint of any resident of the state of violations of the Securities Law, to issue a cease and desist order restraining further violations after at least ten days notice by registered mail to persons, corporations or associations so offering, promoting or selling such securities in the state by means of interstate mail when such persons, corporations or associations cannot be found within the state.

Appellants, pursuant to Section 6 of the Securities Law, charging them with advertising, offering and selling "within the State of Virginia" contracts of insurance and/or indemnity in Travelers Health Association without having obtained the necessary permit. They were summoned to appear before the Commission in Richmond, Virginia, on May 19, 1947, to show cause why a cease and desist order in the nature of a *permanent injunction* should not be issued against them, restraining them from advertising, offering and selling these "securities" in Virginia, by *interstate mail or otherwise*, until properly authorized to do so by the Commission (R. 7).

Since there was no way to obtain personal service of process on Appellants in Virginia, as they were not residents of and were not in any manner present in Virginia, and were not licensed to transact business there, the Commission attempted to obtain jurisdiction over them for the purpose of the above hearing by forwarding attested copies of the order of May 5, 1947, to them in Nebraska by registered mail as authorized by Section 6 of the Securities Law (R. 9).

On May 13, 1947, Appellants, by counsel, entered a special appearance before the Commission only to object to the alleged jurisdiction asserted by Virginia, and to move the Commission to set aside and quash the service of process alleged to have been had upon them (R. 9). The grounds for the motion to quash were (a) that the proceeding was one *in personam* and the constructive service of process was insufficient to support the kind of relief sought and ultimately granted by the Commission, and (b) Section 6 of the Securities Law as applied to Appellants was in contravention of the due process clause of the Fourteenth Amendment to the Federal Constitution. The Federal questions sought to be reviewed on this appeal were therefore explicitly raised at the very outset of this case.

The cause came on for hearing on Appellants' motion to quash the service of summons on September 18, 1947, at which time the issues were argued by counsel upon the following stipulation or agreed statement of facts and upon exhibits introduced in evidence:

"1. Travelers Health Association is a non-profit membership association incorporated for the past forty-two years under the laws of the State of Nebraska and subject to the supervision of the Insurance Department of the State of Nebraska, having its principal and only office for the transaction of business in Omaha, Nebraska.

"2. Travelers Health Association *has not now, nor has it ever had any office, officer, official, agent, representative, bank account, or any other real or personal property, tangible or intangible, located in the State of Virginia.*

"3. Each of the members of said Association *receives by mail from Omaha, Nebraska,* when accepted as a member, *a membership certificate* providing for certain health insurance benefits and *requiring the member,* from time to time, *to forward by mail to Omaha, Nebraska,* the actual cost of such protection through the payment of assessments as levied.

"4. *Every application for membership is received and acted upon by the Association in Omaha. Every applicant regardless of his place of residence, is elected to membership in the offices of the Association in Omaha. All assessments to cover insurance costs and all membership fees are payable in Omaha. All claims for insurance benefits are submitted to the Association in Omaha, and all insurance benefits are paid from the home office there.*

"5. *All notices to members are issued from the home office in Omaha, Nebraska,* addressed to the members

at their respective places of residence throughout the United States, and are then deposited in the United States Post Office in the City of Omaha for transmission through the United States mails to such members.

"6. *New members are usually obtained through recommendations of existing members who submit to the Association at its home office in Omaha the names of friends and acquaintances believed to be able to qualify for membership.*

"7. *The Association at Omaha then writes to each such person*, wherever he may reside, enclosing an application blank *and suggesting that he apply for membership* forthwith in order to secure the advantages of membership, which include health insurance protection and claim payments ~~when ill~~. *All such letters are transmitted by mail from the United States Post Office in Omaha.*

"8. If upon receipt of this letter the proposed applicant is interested, he thereupon fills out the application blank wherever he may reside *and sends it by mail or delivers it personally to the home office of the Association in Omaha, where it is received and acted upon.*

"9. Since beginning business, Travelers Health Association has solicited and obtained numerous memberships throughout the Commonwealth of Virginia *in the manner indicated above.* During such periods it has caused many claims to be investigated. *Payment of claims has been made by mail from the home office in Omaha.* The Association now has approximately eight hundred members (certificates in force) in Virginia.

"10. *The only notice received by the respondents of this proceeding was the receipt on May 9, 1947, by registered mail* of a copy of the proceeding as instituted, known as Case No. 8816, dated May 5, 1947.

"11. R. E. Pratt resides in Omaha, Nebraska." (R. 11) (Italics supplied)

The Commission overruled Appellants' motion to quash the service of process and entered a final order on January 5, 1948, in the form of a *permanent injunction*, as authorized by Section 6 of the Securities Law, restraining Appellants from further advertising, offering and/or selling in Virginia, *through the medium of interstate mail or otherwise*, the "securities" in question until authority to do so is granted them by the Commission and the order of January 5, 1948, duly vacated. (R. 15)

An appeal to the Supreme Court of Appeals of Virginia was awarded Appellants on May 17, 1948 (R. 6). The principal assignments of error relied upon were that the Commission had erred in failing to hold that Section 6 of the Securities Law, as applied to the Appellants, denied them the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution. On January 10, 1949, the Supreme Court of Appeals of Virginia affirmed the judgment of the Commission and expressly sustained the validity of Section 6 of the Securities Law and the application thereof to Appellants (R. 29-43).

SPECIFICATIONS OF ERRORS RELIED UPON

1. That the Supreme Court of Appeals of Virginia erred in giving judgment affirming the final order of the State Corporation Commission rendered January 5, 1948, and thereby sustaining the validity of Section 6 of the Securities Law.

2. That the Supreme Court of Appeals of Virginia erred in failing to hold that the issuance of the cease and desist order in the form of a permanent injunction against Appellants pursuant to Section 6 of the said Securities Law, deprived Appellants of their liberty and property without due process of law in violation of the Fourteenth Amendment of the Federal Constitution.

SUMMARY OF ARGUMENT

The final order of the Virginia Commission of January 5, 1948, issued pursuant to Section 6 of the Securities Law, is an *in personam* decree in the form of a permanent injunction prohibiting Appellants, on pain of fine and/or imprisonment; from acquiring additional members for the Association in Virginia, even though Appellants in so doing are not present in and perform no acts within Virginia. Furthermore, jurisdiction over the Appellants for the judicial proceeding at which this permanent restraining order or injunction was issued, was *based only upon service of process sent by registered mail to them in Nebraska*, as authorized by Section 6 of the Securities Law. Appellants, therefore, while fully recognizing the power of Virginia to regulate and control the activities of foreign corporations and non-resident individuals present or occuring within the territorial limits of the State, assert that:

1. Section 6 of the Securities Law as interpreted and applied to Appellants by the Virginia Commission in this case and affirmed by the Virginia Supreme Court of Appeals, denies to Appellants the rights of due process guaranteed to them by the Fourteenth Amendment of the Federal Constitution, *for the record herein establishes that Appellants have never been domesticated or otherwise been present, residing or doing business in Virginia*, and the communications which passed between Appellants and Virginia members and membership prospects through the interstate mails was a wholly insufficient activity to bring constructive service of process by registered mail sent beyond the state borders, within the requirements of the due process clause of the Fourteenth Amendment, as defined by the decisions of this Court from *Pennoyer* v. *Neff*, 95 U. S.

714 (1887), to *International Shoe Co. v. Washington*, 326 U. S. 310 (1945).

2. The record in this case does not support the finding of the Virginia Supreme Court of Appeals that there were sufficient activities of Appellants in Virginia to bring constructive service of process sent to another state by registered mail within the due process requirements of the Fourteenth Amendment, *and this Court may properly make these findings the subject of inquiry here for they are without evidence in the record to support them and result in Appellants being deprived of the rights guaranteed them by the Fourteenth Amendment.*

3. The decision of the Virginia Court interprets and applies Section 6 of the Securities Law in such manner as to control the activities of Appellants occurring beyond the borders of the State, in violation of the due process provision of the Fourteenth Amendment to the Constitution of the United States as construed by prior controlling decisions of this Court.

ARGUMENT

I.

Invalidity Of The Service of Process

In cases where "securities" are advertised, offered or sold through the mails and other similar means of interstate communication to residents of Virginia, in contravention of its Securities Law, and the parties so offering, advertising or selling the "securities" are not present within the State, Section 6 of the Law authorizes the State Corporation Commission to obtain jurisdiction over them—

> "through the medium of at least ten days' notice instead of five by registered mail, return receipt de-

mailed, to the address or addresses of such person or persons, firms, corporation, society or association insofar as such address or addresses shall be known or shall be available or by publication of notice in a newspaper published in the city of Richmond of general circulation in the State, beginning at least ten days prior to the date set for hearing. . . ."

The decretal paragraph of the final order issued by the Virginia Commission against Appellants, after it assumed jurisdiction over them pursuant to notice by registered mail sent to Nebraska, provides as follows:

> "It Is ADJUDGED, ORDERED AND DECREED, That Travelers Health Association and R. E. Pratt, as Treasurer thereof, and in his personal capacity, be, and they hereby are, directed to cease and desist, and that they be, and they hereby are, enjoined and restrained, until further order of the Commission to the contrary, personally, and/or through any employee, agent, or representative, and/or through medium of any advertisement from within or from without the State, and/or through the mails or otherwise, by intra- or inter-state communication, from offering, advertising, promoting, selling, assisting or participating in or acting in furtherance of, the offer, advertisement, sale and/or promotion in Virginia of contracts of insurance and/or indemnity, unless and until otherwise ordered, or unless and until permit or authorization by the State Corporation Commission shall have been issued according to law, or unless and until qualification shall have been effected under the Insurance Laws, and until this order to cease and desist shall have been duly vacated according to law; . . ." (R. 17)

Sections 15 and 17 of the Securities Law* provide for fines and/or imprisonment for the violation of the Securities

* See footnote p. 4, *supra*.

Law or any order of the Commission issued pursuant to its provisions.

The pertinent uncontroverted facts therefore are: (a) that the final order of the Virginia Commission was authorized by Section 6 of the Securities Law, (b) that the order was not directed against any property or *res* within the jurisdiction of the Commission but specifically required Appellants *personally* to refrain from doing the things prohibited in the order, and is therefore an *in personam* judgment in the form of a permanent compulsory injunction, (c) that violations of the order are punishable by fines or imprisonment, and (d) that the jurisdiction of the Commission in entering its *in personam* judgment was based upon constructive service of process, as authorized by Section 6 of the Securities Law, rather than by direct or personal service of process.

Appellants contend that under the circumstances of this case the service of process, upon which the final order of the Virginia Commission was based, does not meet the requirements of due "judicial" process as defined by this Court from time to time. "Judicial" due process is to be distinguished from "legislative" due process, which is dealt with in a subsequent section of this brief concerning the power of a state to regulate activities of persons and corporations beyond its borders.

A.

Analysis of Cases Defining the Requirements of Judicial Due Process

In holding that Section 6 of the Securities Law did not deny Appellants due process of law, the Supreme Court of Appeals of Virginia relied in large measure upon the decision in *International Shoe Co. v. Washington*, 326 U. S. 310

(1945). This case is the most recent of a long line of cases dating back to *Pennoyer* v. *Neff*, 95 U. S. 714 (1878) (non-resident defendant) and *St. Clair* v. *Cox*, 106 U. S. 350 (1882) (undomesticated corporate defendant), in which this Court consistently has held that the courts of one state can not, without a violation of the due process clause of the Fourteenth Amendment, extend their authority beyond their jurisdiction so as to subject to that power, by *in personam* decrees, the residents of another state or foreign undomesticated corporations *when such individuals and corporations are not within the jurisdiction of the court rendering the judgment*. Appellants contend that neither the *International Shoe Company Case* nor any of the cases which preceded it support the decision of the Virginia Court in the case at bar, for none of them have held either a non-resident individual or an undomesticated foreign corporation to be within the jurisdiction of the court of a state unless the individual sought to be charged with violation of local law was at some time present within the jurisdiction either personally or by an agent, and, if a corporation, conducted some activity within the state by an agent *physically present there*.

(1) *Cases Involving Individual Defendants.*

In *Pennoyer* v. *Neff* (1878), *supra*, this Court held that service by publication against a non-resident did not meet the requirements of due process, and in *Wilson* v. *Seligman*, 144 U. S. 41 (1892), service by notice sent to defendant outside the state was held defective for the same reason. In *New York Life Ins. Co.* v. *Dunlevy*, 241 U. S. 518 (1916), where a Pennsylvania court sought to adjudicate the personal rights of a resident of California in a garnishment proceeding without personal service of process, the foregoing principle was reaffirmed, and in *McDonald* v.

Mabee, 243 U. S. 90 (1917), due process requirements were held to be violated where a Texas court sought to adjudicate the personal rights of the defendant domiciled in Missouri, when service of process was by publication. Likewise, in *Flexner v. Farson*, 248 U. S. 289 (1919), the Court held that due process requirements were violated by a Kentucky court when it attempted to render an *in personam* decree against members of an Illinois partnership by service of process upon a former agent of the partnership in Kentucky after his agency had been terminated.

Appellants therefore submit that this Court has never held constructive service of process on a non-resident *individual* to be within the requirements of due process unless the individual was domiciled in the state, or was physically present there, or had been present there in the past in connection with the act complained of, or had an agent physically present there. In the present case the individual Appellant is not domiciled in Virginia, has never been present there and has conducted no business in that state, and therefore cannot constitutionally be subjected to the jurisdiction of the state by constructive service of process.

(2) *Cases Involving Corporate Defendants.*

Turning now to the the cases involving the invalidity of service of process on corporate defendants, this Court in *St. Clair v. Cox* (1882), *supra*, first applied the doctrine of *Pennoyer v. Neff* (1878), *supra*, to an undomesticated corporation where a Michigan court sought to adjudicate the rights of the corporation based upon personal service on its agent in Michigan, there having been no showing that the corporation was doing business in the state or that the agent was more than casually present there.

The following cases have also held service of process on

an agent physically present in the state insufficient to meet the requirements of due process: *Green* v. *Chicago, B. & Q. R. Co.*, 205 U. S. 530 (1907) (soliciting agent); *W. S. Tyler Co.* v. *Ludlow-Saylor Wire Co.*, 236 U. S. 723 (1915) (soliciting agent); *Philadelphia & Reading R. Co.* v. *McKibbin*, 243 U. S. 264 (1917) (present in state only by connecting carrier); *Peoples Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79 (1917) (soliciting agent); *Rosenberg Bros. Co.* v. *Curtis Brown Co.*, 260 U. S. 516 (1923) (periodic presence of agent to purchase supplies for resale in another state). See also *Goldey* v. *Morning News*, 156 U. S. 518 (1895), and *Riverside Mills* v. *Menefee*, 237 U. S. 189 (1915), where this Court held that foreign undomesticated corporations not doing business in a state could not be subjected to the jurisdiction of the courts of that state upon service of process on one of the officers who happened to be a resident of, or otherwise causally present in the state.

Additional cases decided by this Court involving undomesticated insurance corporations in which the question of the adequacy of service of process was involved are *Hunter* v. *Mutual Reserve Life Ins. Co.*, 218 U. S. 573 (1910), and *Providence Savings Life Assurance Society* v. *Kentucky*, 239 U. S. 103 (1915), where the fact that the insurance companies had policyholders residing in the state of the forum was held *not* sufficient to justify substituted service of process, the insurance companies having withdrawn from the state and ceased doing business there prior to the institution of the suits. In the *Hunter Case* the action was on policies that were not issued and sold in the state of the forum and in the *Providence Savings Association Case* the action was for collection of a privilege tax levied by the state of the forum.

In *Old Wayne Life Ins. Co.* v. *McDonough*, 204 U. S. 8

(1908), it was also held that a Pennsylvania court had violated the requirements of due process in attempting to adjudicate the rights of an Indiana insurance corporation in an action brought by a Pennsylvania resident on a policy negotiated outside that state. Service of process was had upon the corporation through the state insurance commissioner, as provided by the Pennsylvania statute. This Court based its decision on the theory that, although the state statute provided that the presence of a corporation doing business in the state constituted the appointment of the state insurance commissioner as agent to accept service of process in cases involving business transacted by it in Pennsylvania, it did not extend to cases involving business that was not transacted in Pennsylvania.

Finally, reference is made to the case of *Minnesota Commercial Men's Assoc.* v. *Benn*, 261 U. S. 140 (1923), *which was cited by this Court in the International Shoe Company Case as an example of an undomesticated corporation which had not sufficient contacts with the state of the forum to permit constructive service of process.* In the *Benn Case* a Minnesota non-stock, non-profit insurance corporation had accepted a resident of Montana as a member, thereby affording him health and accident insurance protection. All aspects of the acquisition of this Montana member were handled by interstate mail, which was the defendant's customary method of doing business although its Montana members solicited new members voluntarily from time to time. Suit was brought in Montana against the corporation on the membership contract, based upon constructive service of process, and judgment was entered by default. When the judgment was sought to be enforced in Minnesota this Court held that the service of process under the circumstances did not meet the constitutional requirements of due process. The defendant had no office,

agent or property in Montana and transacted all of its business by mail from its Minnesota office in a manner identical with the corporate Appellant in the case at bar, and this Court held that there was not sufficient activity in Montana "to warrant the inference that the corporation had subjected itself to the local jurisdiction, . . ." (p. 145)

Appellants therefore submit that in the case of corporations, as well as individuals, this Court, down to and including the *International Shoe Company Case*, has never held that an undomesticated corporation which has been neither present nor otherwise doing business in a state, can, by constructive service of process sent out of the state, be subjected to the jurisdiction of that state in *in personam* proceedings. The Virginia court considered the *International Shoe Company Case* as deciding otherwise and upheld the validity of the service of process in the present case. Appellants assert that that case is clearly inapplicable to the facts of the instant case.

(3) *International Shoe Co. v. Washington*, 326 U. S. 310.

The defendant, International Shoe Company, had no office or regular place of business in the State of Washington but maintained there a number of agents *who not only solicited orders in the state but also demonstrated and exhibited the company's products from place to place.* An action was brought by the State of Washington to compel the payment of unemployment insurance taxes levied by it, which were based on the compensation earned by the companys' agents *while working in that state and paid to them there.* Process was served personally on one of these agents of the company *and also* by mailing notice of the proceeding to the defendant at its principal office in Missouri by registered mail.

The decision of this court in holding that the requirements of due process had been fulfilled was therefore based on the activities of the company's agents *actually present in the state*. The court stated that the general requirements of due process may be satisfied by sufficient "minimum contacts" with a state so that "the maintenance of the suit there does not offend traditional notions of fair play and substantial justice." It is submitted that it was the court's clear intention that such "minimum contacts" as it referred to, were to be restricted, in the case of corporations, to the activities of *their agents actually present within the state*. This is abundantly apparent from the following quotations from the opinion in which italics have been supplied:

> "For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent *within the state* which courts will deem to be sufficient to satisfy the demands of due process." (p. 317)
>
> "'Presence' *in the state* in this sense has never been doubted when the *activities of the corporation there* have not only been continuous and systematic, but also give rise to the liabilities sued on, . . ." (p. 317)
>
> "The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents *in another state*, is a little more or a little less". (p. 319)
>
> "But to the extent that a corporation exercises the privilege of conducting activities *within a state*, it enjoys the benefits and protection of the laws of the state". (p. 319)
>
> ". . . so far as those obligations arise out of or are connected with the activities *within the state*, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." (p. 319)

As will be developed in the following section of this brief, the Appellants in the present case have never been physically present within the State of Virginia and have never done business there or had an agent or representative of any kind present there. Accordingly they cannot fairly be said to have had the necessary "minimum contacts" with Virginia to justify constructive service of process in the present case under authority of the *International Shoe Company Case*.

(4) *Appellants Have Had No Minimum Contacts with Virginia.*

In its effort to bring the present case within the "minimum contact" rule of the *International Shoe Company Case*, the Virginia court found that Appellants (1) had *solicited* new members there through its present members, (2) had *consummated* membership contracts there, (3) had *investigated* claims in Virginia, and (4) had *discharged* the obligations of the Association there. Neither the Virginia Commission in its opinion supporting the order here appealed from nor the Attorney General of Virginia, either orally or in his brief on behalf of the State before the Virginia Supreme Court of Appeals, asserted that any of these activities took place in the State.

The Commission, in the *order* instituting this proceeding, stated:

> ". . . that the said Travelers Health Association appears to be an insurance company doing in Virginia *only a mail order business which is not required to obtain a license under the Virginia Insurance Laws*, . . ." (R. 7) (Italics supplied)

The Commission also in its *opinion* stated that:

> "Since the *activities* complained of were *by mail and beyond the limits of the State* . . ." (R. 19) (Italics supplied)

the order of summons in compliance with the statute directed that jurisdiction be had by service of process by registered mail.

It is also stated in the Commission's *opinion*:

> "There has been no effort to deny that the respondents, *through medium of the mails from beyond the limits of the State*, have offered for sale, advertised for sale, or otherwise promoted or assisted, participated in or acted in furtherance of the offer, advertisement and/or sale of membership certificates constituting contracts of insurance . . . within this state, to residents of this state. . . ." (R. 19) (Italics supplied)

Again the Commission pointed out in its *opinion* that Appellants:

> ". . . are not charged with doing business in Virginia but with offering and advertising for sale and promoting the sale of insurance in Virginia *by mail* and the action is to foreclose them from *these* activities." (R. 20) (Italics supplied)

It is therefore apparent that there is no basis in fact for the finding by the Virginia Court of Appeals that "The State Corporation Commission concluded that the *foregoing activities* (referring to those dealt with in the Court's opinion but not considered or in any manner dealt with by the Commission) were such as to constitute violations of the Virginia Securities Act and to bring them within the jurisdiction of the State." (R. 35) On the contrary, as appears from the foregoing extracts from the Commission's order and opinion, it predicated its conclusion *solely* upon the fact that Complainants conducted "the activities complained of . . . *by mail from beyond the limits of the State*." (R. 19)

We are confident that counsel for Appellee will not con-

trovert the statement that the Attorney General of Virginia, neither orally nor in his brief on behalf of the State before the Virginia Supreme Court of Appeals, asserted or relied upon the fact that any of the so-called "activities" discussed in the opinion of the Supreme Court of Appeals were relied upon by him in support of the State's jurisdiction over Appellants.

The fact that the Virginia Court found it necessary to base *its* decision on the alleged happening of activities in Virginia is a strong indication, however, of its indirect adherence to the principle that the transmitting of interstate mail into a state is not of itself sufficient to justify constructive service of process.

Appellants assert however that they have conducted no activities in Virginia which would constitute the necessary "minimum contacts" with Virginia within the meaning of the decision in the *International Shoe Company Case* and there is no basis in the record for the finding by the Virginia Court that the above listed activities occurred in Virginia. Appellants submit that they are justified in asking this Court to make these findings of the Virginia Court the subject of inquiry under the long recognized exception to the general rule in this regard, which is succinctly stated in *Aetna Life Insurance Co.* v. *Dunken*, 266 U. S. 389 (1924):

> "The rule is settled that the decision of a state court upon a question of fact ordinarily cannot be made the subject of inquiry here. . . . To this general rule there are two equally well settled exceptions: '(1) *Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it*, and (2) *where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.*'" (p. 394) (Italics supplied).

To the same effect see also *Truax* v. *Corrigan*, 257 U. S. 312, 324-325 (1921); *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 593 (1915); *Wood* v. *Chesborough*, 228 U. S. 672, 678 (1913); *Crescent* v. *Knights of Pythias*, 225 U. S. 246, 261 (1912); *Kansas City Southern Ry.* v. *Albers Commission Co.*, 223 U. S. 573, 591 (1912).

(a) *Solicitation of new members.*

The Virginia Court found that Virginia members assisted in procuring new members in Virginia for which activity the Appellants were responsible, and concluded that such activity, together with the three other activities mentioned above, constituted such "minimum contacts" as were necessary to fulfill the due process requirements defined by this Court in *International Shoe Co.* v. *Washington*.

The only references to the activities of members of the Association in the agreed statement of facts are in Paragraphs 6 and 7* which provide that the names of the prospects for memberships were sent by old members by mail to Appellants in Omaha and that the *letters of solicitation were sent directly by mail to the prospects from Omaha*. The significant point overlooked by the Virginia Court is that this activity of the old members, who had no authority to obligate Appellants, was wholly voluntary, and *was limited solely to the submission of names of prospects to the Association*. In support of its conclusion the Virginia Court stated that the literature was sent to members of the Association which was in effect an implied invitation to members to solicit new members. This literature, samples of which are among the original exhibits filed with the record in this case, was mailed by Appellants only to *pros-*

* See p. 7, *supra*.

pective members and not to *actual* members and *could not therefore constitute such an implied invitation to members.* Assuming, however, that this literature could be construed as an implied invitation to prospective members to solicit new members if and when they became members, such an interpretation of the exhibits is directly contrary to paragraph 2 of the agreed statement of facts.* Certainly the voluntary act of sending a friendly letter suggesting someone's name (not necessarily a resident of Virginia) for membership in the Association does not constitute a business activity on the part of the Association, especially in view of the agreed statement of facts upon which the case was tried. In any event the statement of the Baltimore member in the letter printed on the reverse side of the guarantee slip, which is one of the original exhibits and which was referred to by the Virginia Court (R. 33), is contrary to the stipulation and does not constitute evidence of the activities of the Association's Virginia members.

Appellants contend that the case of *Minnesota Commercial Men's Assoc.* v. *Benn, supra,* is decisive of this aspect of the case, as this Court there held that solicitation by members of a similar association without authority to obligate it in a state in which the association was not domesticated was not such an activity as to subject the association to the jurisdiction of that state. The Court there said:

> "We think it cannot be said that the Association was doing business in Montana merely because one or more members, without authority to obligate it, solicited new members. That is not enough 'to warrant the inference

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* Paragraph 2 of the Stipulation of Facts provides that:

> "The Travelers Health Association has not now, nor has it ever had any office, officer, official, agent, representative, bank account nor any other real or personal property, tangible or intangible, located in the State of Virginia." (R. 11)

that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted.' " (p. 145)

See also, *Rausch* v. *Commercial Travelers Mutual Accident Association*, 38 Fed. (2d) 766 (C.C.A. 8th, 1930) (cert. den. 281 U. S. 763); *Sasnett* v. *Iowa State Traveling Men's Ass'n*, 90 Fed. (2d) 514 (C.C.A. 8th, 1937); and *Oliver* v. *Iowa State Traveling Men's Ass'n*, 76 Fed. (2d) 963 (C.C.A. 8th, 1935).

(b) *Consummation of membership contracts.*

The Virginia Court likewise was in error in concluding that the membership contracts were consummated in Virginia. The Virginia Court based its conclusion on the provisions in the sample membership certificate or agreement, which is an original exhibit filed with the record, that such certificate was issued in Omaha "subject to approval of applicant." The agreed statement of facts herein provides that every applicant "is elected to membership in the offices of the Association in Omaha", and that in each case the new member "receives by mail from Omaha, Nebraska . . . a membership certificate"*. Each certificate, therefore, goes into effect when issued, and *the member's insurance coverage begins at that moment*. It is true that the certificate is subject to cancellation by the new member if, within ten days after its receipt, he decides he does not want it; *but during this ten day period until the certificate is actually cancelled, the applicant is covered by the insurance protection the certificate affords*. Appellants submit that the act of a member in exercising his right to cancel the membership agreement after receiving it does not, therefore, constitute

* See p. 6, *supra*.

a part of the actual *consummation* of the contract and cannot fairly be said to be an activity of the Appellants.*

(c) *Investigation of claims.*

It is submitted that a reasonable interpretation of the stipulation of facts and the exhibits upon which this case was heard does not justify the conclusion of the Virginia Court that the Appellants had made *investigations* with respect to the validity of claims asserted against them arising in Virginia. The record is silent both as to the place and method of the investigations referred to in the stipulation, and it is respectfully submitted that it was sheer speculation on the part of the Virginia Court to conclude that such investigations constituted an activity of the Appellants in Virginia. The statement in paragraph 9 of the stipulation that the corporate Appellant "has caused many claims to be investigated"** is perfectly clear in this respect when read in the light of the language of paragraph 2 of the stipulation of facts, which is as follows:

> "Travelers Health Association has not now; nor has it ever had, any office, officer, official, agent, representative, bank account, or any other real or personal property, tangible or intangible, located in the State of Virginia." (R. 11)

Obviously under the stipulated facts the Association could not itself have made the investigation because it never had any agent *or representatives* in Virginia.

The Virginia Court in discussing the activities of Appellant (R. 30-43) avoided any mention of the word "repre-

* In the brief filed in the Supreme Court of Appeals of Virginia on behalf of Appellee it was admitted at page 2 that the "actual contract of insurance is made in Nebraska."

** See p. 7, *supra*.

sentative" when referring to paragraph 2 of the stipulation. It is submitted that "representative" as used in the stipulation in conjunction with the words "office", "official" and "agent" leaves no doubt that the corporate Appellant has had no one in Virginia at any time performing any activities for it who could be said to be "investigating" claims, and the finding of the Virginia Court to the contrary is unwarranted.

(d) *Discharge of claims.*

The Virginia Court likewise was in error in concluding that the payment and discharge of claims of Virginia members by forwarding checks to them there through the interstate mails from Omaha constituted a Virginia activity. Such a finding is not only contrary to any fair and reasonable interpretation of paragraph 9 of the stipulation of facts, the pertinent sentence of which is "Payment of claims have been made by mail from the home office in Omaha",* but it is also inconsistent with the decisions of this Court in *Minnesota Commercial Men's Assoc.* v. *Benn*, *supra*, and *Hunter* v. *Mutual Life Insurance Co.*, *supra*. See also *Kasel* v. *Milwaukee Employees Pension Assoc.*, 221 N. W. 21 (Minn. 1928).

The checks when received by the Virginia claimant's are not accepted in absolute payment or discharge of the obligations but only on condition that they be paid when forwarded to a collecting bank in Omaha by the claimants' banks in Virginia. Such claims therefore are actually discharged in Omaha and the finding of the Virginia Court to the contrary finds no support in the record and is inconsistent with the applicable legal principle as to the actual discharge of a claim paid by check. *Segrist* v. *Crabtree*, 131

* See p. 7, *supra*.

U. S. 287 (1889); *McRae Grocery Co.* v. *Independence Indemnity Co.*, 33 Fed (2d) 494 (C.C.A. 4th, 1929).

Appellants submit that the Virginia Court was therefore in error in finding that they or either of them had (1) solicited new members within the state, (2) had consummated contracts of membership there, (3) had investigated the validity of claims in Virginia, or, (4) had discharged claims in Virginia.

Appellants further submit that the record discloses no activities of the Appellants in Virginia and that they, therefore, have not had the requisite "minimum contacts" with the State and may not constitutionally be subjected to the *in personam* jurisdiction of the Virginia Court by constructive service of process sent to them outside the State. When confronted with almost the identical situation in *Minnesota Ass'n* v. *Benn*, *supra*, this Court stated:

> ". . . an insurance corporation is not doing business within a State merely because it insures lives of persons living therein, mails notices addressed to beneficiaries at their homes and pays losses by checks from its home office. . . .
>
> "We conclude that the record fails to disclose any evidence sufficient to show that petitioner was doing business in Montana within the proper meaning of those words, and that the court there lacked jurisdiction to award the challenged judgment." (p. 445)

There is, therefore, no basis in fact or in law for the finding of the Virginia Court that, because of certain alleged "minimum contacts" of Appellants with the State of Virginia, the requirements of due process clause of the Fourteenth Amendment could be and were in fact complied with in the instant case by giving to them notice by registered mail of the institution of this proceeding.

B.

DUE PROCESS REQUIREMENTS THE SAME FOR CIVIL AND CRIMINAL PROCEEDINGS.

The Virginia Court, in sustaining the validity of the constructive service of process authorized by Section 6 of the Securities Act, sought to distinguish *Minnesota Commercial Men's Ass'n* v. *Benn, supra*, and similar cases, on the ground that they involved pecuniary civil judgments while the present proceeding was *quasi* criminal in nature. The Court cited *Merrick* v. *Halsey & Co.*, 242 U. S. 568 (1917); *International Harvester Co.* v. *Kentucky, supra*; *In re Palliser*, 136 U. S. 257 (1890), and *United States* v. *Steinberg*, 62 Fed. (2d) 77 (C.C.A. 2d, 1932) (cert. den. 289 U. S. 729), in support of this alleged distinction in due process requirements.

Before discussing the conclusions of the Virginia Court in this respect, it is of interest to note that the Commission took no such view of the nature of the proceeding. On the contrary, it was at pains to point out that the sections of the Securities Law, making violation of the Commission's orders a crime and imposing appropriate penalties (Sections 15 and 17),* had no application to the proceedings and held that Section 6 of the Law under which it was being conducted was remedial in its purpose and not criminal in it objective. (R. 23)

Appellants submit, however, that the due process requirements of the Fourteenth Amendment are the same for both civil and criminal proceedings, and that the above cases relied upon by the Virginia Court are not to the contrary. In *Merrick* v. *Halsey & Co.*, *supra*, several plaintiffs attacked the constitutionality of the Blue Sky Law of Michigan, all but one of whom were residents of or doing busi-

* See footnote p. 4, *supra*.

ness in Michigan. The remaining plaintiff was an out-of-state brokerage partnership which had no agent in the state and had not otherwise been present there, but sold securities there by interstate mail. This plaintiff, however, made no issue of its absentee status with respect to the State of Michigan, *but to the contrary alleged in its pleadings that it was in like situation with the other plaintiffs. Accordingly, there was no issue as to the validity of service of process involved and there is no reference in the opinion to any distinction between the due process requirements of civil and criminal proceedings.*

International Harvester Co. v. *Kentucky, supra*, involved a criminal proceeding, but process was served on an agent of the defendant *physically present* in the state of the forum who was not only a soliciting agent but also had authority to settle claims. The court in sustaining the validity of the service of process made no distinction between civil and criminal proceedings.

In re Palliser, supra, and *United States* v. *Steinberg, supra*, are similar cases involving criminal prosecutions in courts of the United States for violations of Federal statutes in which the courts had, in a manner not disclosed in the opinions, acquired actual physical jurisdiction of the defendants who were charged with having committed crimes in the districts in which they were being prosecuted from points outside those districts. The cases, therefore, involve situations wholly different from the case at bar and there was no issue as to the validity of the process and no distinction was drawn between the due process requirements in criminal and civil proceedings.

Assuming that the proceeding in the present case was properly classified by the Virginia Court as criminal or *quasi* criminal in nature, Appellants, nevertheless, may not be prosecuted *in absentia* in such a proceeding without valid service of process, for it is universally recognized that in

order that a crime be constitutionally prosecuted and judgment rendered it is necessary that a court have jurisdiction (a) over the offense and (b) *over the person of the accused.* See 14 American Jurisprudence (Criminal Law), Section 214. Merely because Virginia declares the sending of communications to its citizens through the mails from outside of the State to be a crime does not establish its jurisdiction to adjudicate the innocence or guilt of the alleged offenders. Therefore, unless and until Virginia actually obtains such jurisdiction over their persons by valid service of process and/or arrest within the State, or by extradition, it cannot constitutionally convict Appellants of the offense alleged to be involved in this proceeding.

In *Strassheim* v. *Daily*, 221 U. S. 280 (1910), Mr. Justice Holmes emphasized in the following language the distinction between jurisdiction over the offense and over the person of the defendant and the necessity of having both in a criminal proceeding:

> "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, *if the State should succeed in getting him within its power.*" (p. 285) (Italics supplied)

The Virginia Court apparently recognized the necessity of acquiring personal jurisdiction over Appellants here, for it asserts that Virginia could acquire such jurisdiction over Appellants by means of extradition, and reasons that since the state had this power it was justified in conducting the proceeding in question which it held to be analogous to a preliminary hearing in an ordinary criminal case. It is submitted, however, that the present proceeding was far more than a preliminary hearing since it involved a judicial determination that Appellants were in violation of the Securities Law and resulted in a final *in personam* judg-

ment against them. In any event, the Virginia Court is indeed credulous if it believes that the Governor of the State of Nebraska could be persuaded to grant extradition to Virginia of a Nebraska corporation and a Nebraska individual enjoying the highest reputation and standing in that state for the performance in Nebraska, under the supervision and approval of the insurance commission of that state, of acts entirely lawful there.

Since there is no reasonable justification for the assumption that Virginia could acquire jurisdiction over the person of the Appellants through extradition proceedings, and since neither of the Appellants have conducted any activities whatever in Virginia nor been present or otherwise done business there to such an extent that they can be said to have had the necessary "minimum contacts" with Virginia and thereby warrant constructive service of process, the fundamental rights of due process guaranteed to the Appellants by the Fourteenth Amendment have been violated flagrantly by the final order of the Virginia Commission of January 5, 1948, and that order and Section 6 of the Securities Law should therefore be declared unconstitutional and void. A decision to the contrary permitting Appellants to be subjected to the jurisdiction of the State of Virginia for the purpose of such a judicial proceeding would go far beyond the decision in the *International Shoe Company Case* and would establish the principle that the mere act of sending letters into a state through the mail constitutes the necessary "minimum contacts" with a state so as to meet the due process requirements of an *in personam* proceeding against the offenders. Manifestly such a principle is undesirable and unnecessary and would tend to weaken the Federal union by destroying the independence of the several states and their citizens against the jurisdiction of the courts of other states.

II.

Invalidity of Attempt to Control Appellants' Activities Beyond the State's Borders

Aside from the question of the validity of the service of process in the present case, Appellants assert that Section 6 of the Securities Law as applied to them also violates the due process requirements of the Fourteenth Amendment in attempting to regulate and control their activities occurring beyond the borders of Virginia which are lawful where they occur. Thus, even assuming that Virginia could obtain valid service of process on Appellants, they submit that the state may not validly control and regulate their lawful activities in Nebraska. *Allgeyer* v. *Louisiana*, 165 U. S. 578 (1897); *St. Louis Cotton Compress Company* v. *Arkansas*, 260 U. S. 346 (1922); *Fidelity & D. Co.* v. *Tafoya*, 270 U. S. 426 (1926); *Compania General deTabacos* v. *Collector of Internal Revenue*, 275 U. S. 87 (1927).

Appellants are aware of the recent decisions of this Court in *Osborn* v. *Ozlin*, 310 U. S. 53 (1940) and *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313 (1943), which in effect approve state control of out-of-state activities of foreign insurance companies on the grounds that the state has a legitimate interest in the activities in question. It is significant to note, however, that each of these cases involved parties *that were admittedly licensed to do business in the state of the forum and were actually doing business within the state*, whereas in *Allgeyer* v. *Louisiana*, *supra*, and the line of cases cited above, the defendants were neither licensed to do business in the state of the forum nor conducting any business within the state's borders. It is submitted that this is a critical distinction which should be decisive of the issue here involved.

In the *Hoopeston Canning Company Case*, *supra*, Illinois

insurers who had been licensed to do business in New York for a great many years, insured immovable property located there and sent inspectors into the state from time to time before and after the consummation of each contract of insurance. In *Osborne* v. *Ozlin, supra*, the statute under consideration applied only to insurance companies "legally authorized to do business" in the State of Virginia.

In *Compania General deTabacos* v. *Collector of Internal Revenue, supra*, however, the defendant, whose activities the court held were not subject to the jurisdiction of the Philippine Court, was a foreign insurance company not licensed to do business or otherwise transacting business in the Philippine Islands, and in the *Tafoya Case, supra*, where the defendant was licensed to do business in New Mexico, a statute of that state was struck down as exceeding the State's power because it applied to activities of insurance companies in other jurisdictions. Likewise, in the *St. Louis Colton Compress' Company Case, supra*, an Arkansas statute was held invalid which sought to collect the discount on gross premiums paid by the defendant upon insurance on its property in Arkansas to companies not authorized to do business in the state since the policies involved had been contracted for, paid for and delivered in Missouri. Finally, in *Allgeyer* v. *Louisiana, supra*, a Louisiana statute which sought to regulate the activities of a foreign insurance company by penalizing Louisiana residents for doing business with that company out of the state by the use of the United States mails, was held invalid.

Mr. Justice Frankfurter, in *Osborn* v. *Ozlin, supra*, has stated in particularly apt language the issue here raised:

> "It is whether Virginia has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern

because the Constitution has placed control elsewhere." (p. 62)

The principle which Appellants assert is applicable here was stated by Mr. Justice Holmes in referring to the *Allgeyer Case* in *St. Louis Cotton Compress Company* v. *Arkansas, supra*, as follows:

> "The Arkansas tax manifests no less plainly than the Louisiana fine a purpose to discourage insuring in companies that do not pay tribute to the State. This case is stronger than that of Allgeyer in that here no act was done within the State, whereas there a letter constituting a step in the contract was posted within the jurisdiction. It is true that the State may regulate the activities of foreign corporations within the State *but it cannot regulate or interfere with* what they do outside . . . ." (pp. 348-349) (Italics supplied)

In the earlier case of *New York Life Insurance Company* v. *Head*, 234 U. S. 149 (1914), the court recognized this principle in the following language:

> ". . . it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." (p. 161)
>
> * * * *
>
> ". . . the Constitution and its limitations are the safeguards of all the States preventing any and all of them under the guise of license or otherwise from exercising powers not possessed." (p. 164)

Likewise, in the more recent case of *Hartford Accident & Indemnity Company* v. *Delta & Pine Land Company*,

292 U. S. 143, (1934), this Court reaffirmed the principle recognized in the *Head Case* in declaring that a state:

> ". . . cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction, and lawful where made. New York Life Ins. Co. v. Head, 234 U. S. 149; Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 399. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. Home Insurance Co. v. Dick, 281 U. S. 397, 407-8." (p. 149)

Appellants respectfully submit that since they have conducted no business in Virginia and have never been present or otherwise done business there, the principle of the *Allgeyer* line of cases is applicable here and that there is no justification for the extension to the case at bar of the doctrine of the *Ozlin* and *Hoopeston Canning Company Cases*.

III.

CONCLUSION

Appellants wish to emphasize that they do not question the power of Virginia to regulate and control insurance companies to the extent that they or their agents do business within its borders. Nor do Appellants question the validity of the Securities Law to the extent that it provides that individual and corporate residents of other states shall not come into the State for the purpose of doing business there without first submitting to the regulatory authority of the State. Nor would Appellants question the legal propriety of reasonable public notice to the citizens of Virginia of the fact that an undomesticated corporation had not submitted to the

regulatory authority of the State regardless of whether the corporation could be compelled to submit to that authority or not. Appellants, however, earnestly deny the constitutional authority of Virginia, by legislative enactment, to require the corporate Appellant herein to submit to the regulatory authority of the State before continuing its interstate business by mail with Virginia citizens, and, upon its rightful refusal so to submit, to conduct an *in personam* judicial proceeding in the State against both Appellants based solely on constructive service of process by registered mail sent outside the State, in which the Appellants made no general appearance and which resulted in a permanent injunction being issued against them. This, it is submitted, is an unwarranted, unjustified and unconstitutional extension of the State's power in clear violation of the requirements of both legislative and judicial due process.

Appellants submit that the approval of such statutes as Section 6 of the Securities Law is not necessary *to enable the states properly to protect their citizens for they can be afforded reasonable protection by public notice of the corporations which are either not subject to the states' regulation, or which are not for any reason being regulated by it.* If further regulation and control of such corporations, as the corporate Appellant here, is deemed necessary or desirable in addition to that of the state of incorporation, it should properly come from the Federal Government which has heretofore, by the Securities Act of 1933 and subsequent similar legislation, supplemented the securities laws of the various states to the extent of providing for a full disclosure in connection with the issue and sale of certain types of securities (not including contracts of health insurance) flowing in interstate commerce by the use of the United States mails or otherwise. These Federal laws were admittedly enacted because the states were powerless to control this type of activity. See 47 American Jurisprudence

(Securities Act), Section 1, and *Securities and Exchange Commission* v. *Wickham*, 12 F. Supp. 245 (D. Ct. Minn. 1935). See also *Charles Hughes & Co.* v. *Securities and Exchange Commission*, 139 Fed. (2d) 434 (C.C.A. 2d, 1943).

It is manifest that the determination by the Congress of the necessity for these laws was a recognition of the constitutional limitation which prevented the several states from exercising effective control over the issue and sale of securities by mail in interstate commerce. It is precisely the same constitutional limitation which renders Section 6 of the Securities Law unconstitutional as applied to Appellants in this case.

It is therefore respectfully submitted that the decision of the Virginia Supreme Court of Appeals, in upholding the final order of the State Corporation Commission of January 5, 1948, and sustaining the constitutionality of Section 6 of the Securities Law, should be reversed and the statute declared unconstitutional and void as applied in the instant case.

Respectfully submitted,

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Dated: October 14, 1949.

APPENDIX

SECTION 6 OF THE VIRGINIA SECURITIES LAW AS AMENDED BY THE ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF VIRGINIA, 1932.

CHAP. 236.—An ACT to amend and re-enact section 6 of an act entitled "an act to prevent unfairness, imposition or fraud in the sale or disposition of certain "securities" herein defined by requiring an inspection thereof, providing for such inspection, supervision and regulation of the business of any person, association, partnership, or corporation, engaged or intending to engage, whether as principal, broker or agent, in the sale of any such securities in the State of Virginia as may be necessary to prevent unfairness, imposition or fraud in the sale or disposition of said securities, and prescribing penalties for the violation thereof," approved March 23, 1918, as heretofore amended.

[S. B. 335]

Approved March 23, 1932

1. Be it enacted by the general assembly of Virginia, That section six of an act entitled "an act to prevent unfairness, imposition or fraud in the sale or disposition of certain "securities" herein defined by requiring an inspection thereof, providing for such inspection, supervision and regulation of the business of any person, association, partnership, or corporation, engaged or intending to engage, whether as principal, broker or agent, in the sale of any such securities in the State of Virginia, as may be necessary to prevent unfairness, imposition or fraud in the sale or disposition of said securities, and prescribing penalties for the violation thereof," approved March twenty-third, nineteen hundred and eighteen, as heretofore amended, be amended and re-enacted so as to read as follows:

Section 6. The State corporation commission shall have jurisdiction at the instance of any resident of this State,

upon affidavit by such resident duly sworn to, or of its own motion, and upon such facts and established in such manner, as required in a court of equity, for purposes of an injunction, after at least five days' notice to the party defendant and an opportunity to be heard, said notice to be accompanied by a statement of the facts and charges upon which action is proposed, to issue a cease and desist order in the nature of a temporary injunction and restraining order in the matter of and against any person, firm, corporation, society, or association, which it appears from the facts is offering for sale, advertising for sale, or otherwise promoting or assisting, participating in or acting in furtherance of the offering, advertising, selling or otherwise promoting any securities or land which should be qualified and which are not, and/or in any case in which it appears that a fraud, legal or equitable, intentional or unintentional, is being perpetrated and/or attempted in connection with the disposition or attempted disposition of securities, or out of State land, to the public, whether the provisions of this act as to qualification or notification apply or not, and even though one or more of the exemptions or exceptions under this act should be applicable, and even though qualification or registration under the provisions of this act has been effected, enjoining and restraining such person, firm, corporation, society or association, from further offering, advertising, selling, or promoting, assisting or participating in or acting in furtherance of such offer, advertisement, or sale and if said cease and desist order is issued, it shall thereafter proceed as soon as may be after due notice and after a full hearing on the merits to consider and determine whether or not such cease and desist, or restraining order, and injunction shall be dismissed or made permanent, and its action, subject to right of appeal, shall be conclusive in any court in the State in any matter, civil or criminal upon

the same state of facts. The proceeding shall be analogous to and in accordance with proceedings in equity for injunctions, except as otherwise specifically provided, and the commission in this connection shall have power and authority to require a bond with surety in accordance with the principles applicable in the courts of equity of this State, and it shall have power and authority to exercise a sound, judicial and equitable discretion in the administration of these and all other provisions of this act with a view to the accomplishment of that measure of protection to the public contemplated by this act with as little interference with legitimate business as is consistent with the accomplishment of the objects of this legislation.

In any case in which it is made to appear, or the commission has reason to believe from facts before it, that a proceeding should be instituted to determine whether a cease and desist order or injunction should issue in accordance with provisions of this section and service upon the person or persons, firm, corporation, society, association, or any agent or representative cannot be had because the offering is by advertisement and/or solicitation through periodicals, mail, telephone, telegraph, radio, or other means of communication from beyond the limits of the State, or the person or persons who appear to have personally violated the law within the limits of the State have left the jurisdiction of the State temporarily or permanently, or the original and at least one alias process have been returned not found, jurisdiction may be obtained through the medium of at least ten days' notice instead of five by registered mail, return receipt demanded, to the address or addresses of such person or persons, firms, corporation, society or association insofar as such address or addresses shall be known or shall be available or by publication of notice in a newspaper published in the city of Richmond of general circula-

tion in the State, beginning at least ten days prior to the date set for hearing, and in case of nonappearance in response to such notice, or in case of special appearance, and after full hearing upon the merits, the commission may issue a cease and desist order, in the nature of a temporary injunction, and/or a permanent injunction, in accordance with the preceding provisions of this section where service is had or general appearance is made, and forward by registered mail, return receipt demanded, attested copies of such order to the same addresses or such later addresses as may become known and give such other publicity as it may see fit, and in case no addresses were known or shall have become known such publicity as the commission may see fit shall be given to such order, including notice in either case to the public through the press or otherwise as the commission may, in its discretion, determine to be advisable for the reasonable information and protection of the public.

The provisions of this section, as amended, are subject to the following provisos: Nothing herein shall be construed as being applicable, as an offeror, solicitor, or advertiser of any securities or out of the State land to the publisher of any newspaper or periodical admitted to second class mailing privileges under the United States postal laws except and until the notice provided for in section two hereof shall have been given by the commission, and further, nothing herein shall be construed, so as to, in any way, impair, or infringe upon the right of any citizen or resident, natural or corporate, or person or corporation temporarily within the State of Virginia to offer, of his, her, or its own initiative, to subscribe for, order, or buy from any nonresident person, firm, corporation, or association, any security or out of the State land which any such citizen, resident or temporary sojourner may desire to subscribe for, order or buy.

Any order that may be entered as the basis of the institution of a proceeding under this section and the issuing of the at least five or ten days' notice, as the case may be, in the discretion of the commission may be kept on the secret docket and not made public until after the prelinminary or final hearing, as the commission may determine.